# Judge, Juror, and Arbitrator Perceptions in Trade Secret and Copyright Infringement Cases


**By**
**Richard Waites, J.D., Ph.D.**
**The Advocates**
**Jury Consultants and Trial Consultants**
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*"The secret of business is to know something that nobody else knows."*

*Aristotle Onassis (1906-1975)*

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**Attorney* and Chief Trial Psychologist**

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* Board Certified – Civil Trial Law.

Intellectual property cases offer many challenges to trial attorneys. The stakes are usually high for their clients and there is a great deal of pressure to win the case. Business people are at the heart of the internal decision-making process and they tend to be risk averse. Faced with high stakes, risk averse clients, and decisions that may ultimately be made by a disinterested judge, jury or arbitration panel, intellectual property attorneys are constantly looking for ways to outperform the opposition and gain the most powerful advantage in the courtroom.

## Intellectual Property Trials Generally

Experienced intellectual property trial lawyers have learned that the trial team must work its way through the mountain of complexities in the case only to find themselves faced with ways to simplify the case and persuade a judge, jury, or arbitration panel. An example is the relatively simple case of a copyright infringement claim brought against the Baltimore Ravens by a fan, who was a security guard named Bouchat. Bouchat had designed a suggested logo with a raven holding a shield and faxed it to the team's home office. Shortly thereafter, the team revealed its new logo which looked "strikingly similar" to the one that Bouchat had sent in. However, the Ravens disputed that they had used his design idea.

The case proceeded to a jury trial after the trial judge ruled that there was sufficient evidence to raise a fact issue. Many months of intense legal research and technical study ensued in which the opposing trial teams fought over every legal and technical detail they discovered. In the end, however, a jury decided that the case was simple. After looking at the timing of events and the similarity of the design, the jury decided that someone with the Ravens' organization had, indeed, copied the design.

Whether a case involves unauthorized disclosure of trade secrets, antitrust violations, copyright or patent infringement, unlawful use of trademarks, or any other type of intellectual property claim, most jurors work hard to try to understand the details. However, jurors' greatest interest lies in the simple human story that is at the center of every controversy. They want to know and understand the meaning that is at the core of the case. As has often been stated, "Inside every complex case is a simple story struggling to get out."

## Trade Secret Cases

Trade secret cases offer enormous opportunities for trial teams to tell an interesting story. Although many of the issues in these cases will be decided by a trial judge, there are often attention-grabbing fact circumstances which may be presented at trial to either a judge, jury, or arbitration panel.

By the time most trade secret cases go to trial, liability is unclear and damages are hotly contested. If a case involves situations where a defendant was "caught red-handed" while stealing or copying ideas or materials, the case would not likely go to trial and if it did, the fact finder would not take long to decide the case.

As for the "win" rates in trademark cases, judges tend to find for plaintiffs about 58% of the time while juries tend to side with the plaintiff in only 42% of cases. Jurors view themselves as consumers and believe that they are sophisticated and intelligent enough to tell the differences in trademarks and competitors.

Trade secret cases are generally complicated within larger scenarios. For example, it is common for companies to sue former employees if they believe that they have taken trade secrets with them to their new places of employment. This type of case circumstance offers many opportunities for opposing trial teams to argue from different perspectives.

The plaintiff employer might argue that the employee signed an employment agreement promising not to take trade secrets if the employee should ever resign. The employer might also argue that even though the employee did not take any documents or things belonging to the company when the employee left, that the trade secrets of the employer remain in the employee's head. The employer might also argue that the employee will inevitably be required to utilize trade secrets of the employer when working at the new place of employment.

In return, the employee will remind the jury that he or she did not take any documents or things upon resigning from the company. The employee will also state that he or she will continue to honor their promise not to use trade secrets of the former employer at any time.

The central argument in this scenario is over the meaning of the term "trade secret." The employer (or any owner of a trade secret) will want to argue that the term "trade secret" should have a broad meaning and encompass all private information of the company and anything that the employee learned while employed by the company. The employee, only other hand, will argue that the term should have a more narrow meaning and should encompass only information that was developed by the employer (or under the employer's supervision) and is essential to the employer's operations.

In cases like these where legal definitions are central to a case, some education of the judge, jury or arbitration panel is required. They need to know the scope of their inquiry. However, most judges, jurors and arbitrators are sophisticated enough in the world of business and employment to know that they must figure out whether all of the information that the employer believes is trade secret, it is in fact, trade secret. Both parties will put on fact and expert witnesses to discuss how much of the information is actually already in the public domain. If, after hearing the evidence, fact finders still have questions about the essential facts, they will simply judge the credibility of the witnesses who have testified like any other fact finder.

After determining which information, if any, is trade secret, judges, jurors and arbitrators are capable of determining whether the employee is unjustifiably using a previous employer's trade secrets at the employee's new place of employment. In making this determination, fact finders scrutinize the employee closely. They also make judgments about the credibility and likeability of each of the witnesses and parties in order to determine who to believe.

## Copyright Infringement Cases

Copyright infringement cases also offer enormous opportunities for trial teams to tell an interesting story. Typical evidence that reveals what was copied, how it was copied, and how the copying was discovered generally provide a basis for some high drama.

Statistical comparisons of judge and jury decisions in copyright cases in the federal courts indicate that both judges and jurors side with the plaintiff about 72% of the time. There are no apparent differences in how judges and juries decide these cases.

One of the most interesting issues that we have uncovered in conducting jury research in these circumstances, is the overlap between juror perceptions in employment cases and juror perceptions in intellectual property cases. We have learned that jurors are sophisticated enough to know whether a former employer is wrongfully trying to inhibit an employee from working for a competitor by accusing the employee of stealing trade secrets. In this instance, jurors are often persuaded that a plaintiff employer is essentially trying to interfere with the freedom of an employee to work wherever he or she wants to work. They believe that employee must be free to make employment decisions that benefit the employee's family without interference from a former employer.

## Simplifying the Case and Winning the Argument

Winning a trade secret or copyright infringement case is often a matter of successfully framing the argument in a way which is favorable to your client. By keeping the "bad guy" on stage and causing the jury to scrutinize his behavior closely, you generally place yourself and your client in a stronger posture.

Perhaps the greatest challenge for any intellectual property lawyer is to find a way to simplify the case for the judge, jury or arbitration panel. All courtroom decision makers, no matter how educated and sophisticated they are, believe that at the heart of every complex situation is a simple story waiting to be discovered.

They believe that the meaning of the case, its essence, lies in the human story at the core of the case. They are willing to undergo the mental gyrations necessary to learn the technical details, but they are focused on the core of truth in the case, rather than the facts.

Your chances of success will be enhanced when you utilize simple persuasive tools to help judges, jurors and arbitrators learn the necessary details more easily, while at the same time not losing site of the essential themes and story of the case.

There are many visual tools and storytelling techniques that will make learning about the case easier for the fact finders and, yet, also promote a persuasive story presentation.

## About the Author

Dr. Richard Waites is a board certified civil trial lawyer and is the chief trial psychologist and CEO for Advocacy Sciences, Inc. and **The Advocates**, the nation's leading trial and advocacy consulting firm.

The Advocates' clients include major law firms and corporations all over the United States (www.theadvocates.com).

**The Advocates** is the nation's leading jury and trial consulting firm with offices in more than 17 major U.S. cities. The **trial consultants** and **jury consultants** with **The Advocates** have more than 32 years experience assisting trial attorneys and corporations in some of the most high profile cases in the areas of torts, products liability, complex business litigation, intellectual property, employment and most other areas of practice.

The firm provides support for many state and national professional organizations, including the American Bar Association, American Psychological Association, American Society of Trial Consultants, and the Association of Corporate Counsel. Dr. Waites is the author of the new book, ***Courtroom Psychology and Trial Advocacy***, published by American Lawyer Media.

For questions about the subject of this article, the author can be reached by email at rwaites@theadvocates.com or toll-free at 1.877.621.1098.

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